Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLES AND LESA CANAS,
as Natural Guardians and Next Friends of
DEREK CANAS, and DEREK CANAS, Individually,

Petitioners,

v.

AYMAN AL-JABI, M.D.; SHARON J. KAMINER, M.D.;
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM
OF GEORGIA d/b/a MEDICAL COLLEGE OF GEORGIA
HOSPITALS AND CLINICS; and MCG HEALTH, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

J. ROBERT PERSONS
CARTER & ANSLEY LLP
Atlantic Center Plaza, Suite 2300
1180 West Peachtree Street
Atlanta, Georgia 30309
(404) 658-9220

Attorneys for Petitioners

201863

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether Georgia's medical malpractice statutes of limitations/repose which mandate that a child must file a medical malpractice lawsuit prior to the age of majority denies the child equal protection and due process of law under the Fourteenth Amendment when Georgia law (a) otherwise recognizes that a child is incapable of protecting his or her own rights; (b) provides that a child lacks the capacity to sue in his or her own behalf; and (c) tolls the child's claims until age of majority, except in medical malpractice cases?

2. Whether the same statutes deny persons injured by medical malpractice due process and equal protection by barring claims based on latent medical negligence or latent injuries which are not discovered prior to the expiration of the prescribed time periods?

3. Whether the Supreme Court of Georgia's constitutional validation of these statutes is flawed when multiple state and federal courts have reached contrary results with respect to conceptually indistinguishable laws by employing the same "rational basis" analysis as Georgia courts or, alternatively, by applying "heightened intermediate scrutiny"?

LIST OF PARTIES

The parties are as shown in the caption of the case. The Board of Regents of the University System of Georgia includes the following: Hugh A. Carter, Jr.; William H. Cleveland; Michael J. Coles; Robert F. Hatcher; Julie Ewing Hunt; Felton Jenkins; W. Mansfield Jennings, Jr.; James R. Jolly; Donald M. Leebern, Jr.; Elridge McMillan; Patrick S. Pitlar; Doreen Stile Poitevint; Willis J. Potts; Wanda Yancey Rodwell; J. Timothy Shelnut; Benjamin J. Tarbutton; Richard L. Tucker; and Allan Vigil.

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OPINION BELOW

On February 27, 2006, the Supreme Court of Georgia, which has exclusive jurisdiction to hear appeals involving constitutional challenges to Georgia statutes,[1] declined to review petitioners' due process and equal protection challenges to O.C.G.A. §§ 9-3-71 and 9-3-73 under the United States and Georgia Constitutions. (Appendix A.) Those challenges to Georgia's medical malpractice statutes of limitations/repose had been rejected in two trial court orders dated September 19, 2005 and October 14, 2005, which granted partial summary judgment in favor of respondents based on these statutes. (Appendices C and D.) The latter order expressly denied the due process and equal protection challenges to the statutes raised in petitioners' brief in opposition to respondent Kaminer's motion for summary judgment.[2]

Petitioners' claims, which arose out of the failure to diagnose a child's AIDS condition, were eliminated or truncated by the statutes at issue despite the absence of any evidence that the petitioners had notice or knowledge of the AIDS condition prior to April 2001, just months before suit was filed in December, 2001. In the words of the trial judge: *"While this statute and its interpretation may be unfair or even absurd as it applies to cases such as this one, it is the law and we must apply it."* (emphasis added). Petitioners' claims then were limited to those injuries which occurred within two years of filing the complaint and those negligent acts which occurred within five years of filing the complaint. Petitioners appealed to the Supreme Court of Georgia based on the trial court's rejection of constitutional challenges to the statutes which limited their claims.

1. Ga. Const., art. VI, § 6, ¶ 2 provides:
The Supreme Court shall be a court of review and shall exercise exclusive appellate jurisdiction in the following cases: (1) All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States and all cases in which the constitutionality of a law ... has been drawn into question.

2. Petitioners' Brief in Opposition to Kaminer's Second Motion for Summary Judgment, Section H timely raised the constitutional questions raised here.

The Supreme Court of Georgia declined jurisdiction and would not review the challenge, stating in its Order of February 27, 2006, that it had previously upheld these statutes against the same constitutional challenges.[3] It then transferred the case to the Georgia Court of Appeals for review of other issues. The Supreme Court of Georgia denied petitioners' timely motion for reconsideration on April 13, 2006, foreclosing further review of the constitutional issues raised by petitioners.[4] (Appendix B.)

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The Order of the Supreme Court of Georgia dated February 27, 2006, is a final decree as contemplated under 28 U.S.C. § 1257(a) because the Order forecloses further consideration of the Fourteenth Amendment challenge to the statutes in question. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The Supreme Court of Georgia denied petitioners' motion for reconsideration of the Order on April 13, 2006. The Respondent Board of Regents has been represented throughout the Georgia proceeding by the Attorney General of the State of Georgia and that office has the requisite notice of petitioners' claims that Georgia's medical malpractice statutory scheme of limitations and repose is unconstitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

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3. Citing *Smith v. Cobb County-Kennestone Hosp. Auth.*, 423 S.E. 2d 235 (Ga. 1992) (rejecting equal protection and due process challenges to minor's challenge of O.C.G.A. § 9-3-73) and *Crowe v. Humana*, 439 S.E. 2d 654 (1994).

4. The Supreme Court of Georgia cited and relied upon *Zepp v. Mayor & City Council of the City of Athens*, 339 S.E.2d. 576 (Ga. 1986), the premise of which is that the court will not entertain jurisdiction of cases calling into question constitutional provisions which it has previously decided. This determination is binding on the Court of Appeals and forecloses its consideration of the constitutional questions raised. *See Egerton v. Jolly*, 212 S.E.2d 462 (Ga. Ct. App. 1975). The Court of Appeals recognized in an earlier Order entered November 2, 2005 that only the Supreme Court of Georgia had jurisdiction to hear the constitutional appellate issue (Appendix E).

the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. § 9-3-71. General limitation:

(a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.

(b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.

(c) Subsection (a) of this Code section is intended to create a two-year statute of limitations. Subsection (b) of this Code section is intended to create a five-year statute of ultimate repose and abrogation.

(d) Nothing contained in subsection (a) or (b) of this Code section shall be construed to repeal Code Section 9-3-73, which shall be deemed to apply either to the applicable statutes of limitation or repose.

O.C.G.A. § 9-3-73. Certain disabilities and exceptions applicable:

(a) Except as provided in this Code section, the disabilities and exceptions prescribed in Article 5 of this chapter[5] in limiting actions on contracts shall be allowed and held applicable to actions, whether in tort or contract, for medical malpractice.

(b) Notwithstanding Article 5 of this chapter, all persons who are legally incompetent because of mental retardation or mental illness and all minors who have attained the age of five years shall be subject to the

5. The chapter includes O.C.G.A. § 9-3-90, which recognizes that minors are otherwise legally incompetent and under a disability until the age of majority. Hence, their claims are tolled until the age of majority.

periods of limitation for actions for medical malpractice provided in this article. A minor who has not attained the age of five years shall have two years from the date of such minor's fifth birthday within which to bring a medical malpractice action if the cause of action arose before such minor attained the age of five years.

(c) Notwithstanding subsections (a) and (b) of this Code section, in no event may an action for medical malpractice be brought by or on behalf of:

(1) A person who is legally incompetent because of mental retardation or mental illness more than five years after the date on which the negligent or wrongful act or omission occurred; or

(2) A minor: (A) After the tenth birthday of the minor if such minor was under the age of five years on the date on which the negligent or wrongful act or omission occurred; or (B) After five years from the date on which the negligent or wrongful act or omission occurred if such minor was age five or older on the date of such act or omission.

(d) Subsection (b) of this Code section is intended to create a statute of limitations and subsection (c) of this Code section is intended to create a statute of repose.

(e) The limitations of subsections (b) and (c) of this Code section shall not apply where a foreign object has been left in a patient's body. Such cases shall be governed by Code Section 9-3-72.[6]

(f) The findings of the General Assembly under this Code section include, without limitation, that a reasonable relationship exists between the provisions, goals, and classifications of this Code section and the rational, legitimate state objectives of providing quality health care, assuring the availability of physicians,

6. O.C.G.A. § 9-3-72 provides that "the limitations of Code section 9-3-71 shall not apply where a foreign object has been left in a patient's body, but in such a case an action shall be brought within one year after the negligent or wrongful act or omission is discovered. . . ." This statute is challenged as well because it allows a discovery rule for surgical patients and no others. The statute also cross references O.C.G.A. § 9-3-71.

preventing the curtailment of medical services, stabilizing insurance and medical costs, preventing stale medical malpractice claims, and providing for the public safety, health, and welfare as a whole.

(g) No action which, prior to July 1, 1987, has been barred by provisions relating to limitations of actions shall be revived by this article, as amended. No action which would be barred before July 1, 1987, by the provisions of this article, as amended, but which would not be so barred by the provisions of this article and Article 5 of this chapter in force immediately prior to July 1, 1987, shall be barred until July 1, 1989.

O.C.G.A. § 9-3-90. **Persons under disability or imprisoned when cause of action accrues.**[7]

(a) Minors and persons who are legally incompetent because of mental retardation or mental illness, who are such when the cause of action accrues, shall be entitled to the same time after their disability is removed to bring an action as is prescribed for other persons.

STATEMENT OF THE CASE

Derek Canas, born November 1, 1984, contracted HIV from a contaminated blood transfusion during infant heart surgery at the Medical College of Georgia ("MCG") hospital in the first quarter of 1985, shortly before the FDA approved and implemented a blood screening test for HIV. The surgery compromised the heart's natural pacemaker, requiring a second procedure to implant an artificial pacemaker. Derek had two later surgical procedures for pacemaker replacements at MCG, the last in February of 2000.

Derek Canas was continuously seen and monitored by the pediatric cardiology department at MCG, the last ten years by respondent Kaminer.[8] Kaminer was an employee of the respondent Board of Regents, which operated the hospital until

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7. This statute is not challenged, but is set out because it applies to minors' claims, except in medical malpractice cases.

8. Kaminer saw Derek on 16 occasions from May 17, 1991 through February 15, 2001.

July 2000, when respondent MCG Health, Inc. assumed responsibility for hospital and clinic operations. Kaminer routinely reported her examinations and findings by letter to Derek's local pediatrician, respondent Al-Jabi. Derek was followed by Al-Jabi from 1993 through March 15, 2000, on 39 visits, exclusive of more than 20 trips to the local hospital's emergency room, many of which also involved contact with Al-Jabi.

On each occasion that he was seen by Al-Jabi for a variety of serious childhood illnesses, including pneumonia, tooth decay requiring surgery, herpes-like sores in the mouth, bronchitis, irritable bowel syndrome, swollen lymph nodes and diarrhea, Derek had undiagnosed HIV or AIDS. Likewise, each time that Derek saw Kaminer for examination and cardiac monitoring, he had undiagnosed HIV or AIDS.

By the year 2000, as noted by Kaminer, Derek Canas was 15 years old, 4 feet 2 inches tall, and weighed 58 pounds. His stunted growth resulted from AIDS, although the family was told incorrectly and repeatedly by the respondents that it was a by-product of the congenital heart condition. When Derek's upper respiratory condition worsened in 2000, he was referred to a local pulmonary specialist. This doctor, who was concerned about the child's growth, referred him to the endocrinology department at the University of Florida's Shands Hospital. Following several months of medical investigation there, an HIV blood test was performed and in April 2001, the correct diagnosis was made.

The complaint in this case was filed against the respondent doctors on December 28, 2001, within 9 months of the AIDS diagnosis, and within two years of Derek's last treatment by either doctor. On November 1, 2002, Derek turned 18, the age of majority in Georgia, from which followed a stipulation allowing him to proceed *sui juris*. The complaint was later amended to add the successive owners and operators of MCG Hospital (Board of Regents until July 1, 2000, and MCG Health, Inc. thereafter) on February 7, 2003, following required *ante litem* notice and within two years of Derek's last visit to Kaminer at MCG. All respondents were sued within two years

of discovery that Derek had AIDS in April 2001 and within five years of some, but not all, negligent errors and omissions.

Respondents each moved for summary judgment based on Georgia's medical malpractice statutes of limitations/repose. Petitioners argued in the trial court that these statutes were unconstitutional facially and if applied to truncate or time bar petitioners' claims. On September 19, 2005, the trial court entered an Order granting partial summary judgment to the respondents under O.C.G.A. § 9-3-71, barring petitioners' medical malpractice claims for those wrongful acts which occurred more than five years before the filing of the complaint and for those injuries to Derek which occurred more than two years before the filing of the complaint. This ruling was made in the face of uncontradicted evidence that, until the AIDS diagnosis in April 2001, the petitioners had no knowledge that Derek had gone through his entire childhood with HIV/AIDS, no knowledge of any medical error, and no knowledge that Derek's myriad illnesses and injuries were either exacerbated by, or attributable to, undiagnosed HIV/AIDS.[9] In a later and separate Order of October 14, 2005, the

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9. The Human Immunodeficiency Virus (HIV) is transmitted by direct blood-to-blood contact or by sexual contact with an infected individual. Levine, *Acquired Immunodeficiency Syndrome: The Facts*, 65 S.Cal.L.Rev. 423, 427 (1991). Once a person becomes infected with HIV, the virus attaches itself to T4 cells which are responsible for immune function in humans. *Id.* The virus then multiplies and impairs the immune system, ultimately allowing other infections to occur far more frequently than normal, with devastating effects. Note, *Standards of Conduct, Multiple Defendants, and Full Recovery of Damages in Tort Liability for the Transmission of Human Immunodeficiency Virus*, 18 Hofstra L.Rev. 37, 44 (1989). Once a person has been infected with HIV, the virus begins to incubate over time. Thus, although a person infected with the virus may remain asymptomatic and may appear well in all respects, the virus continues to affect the host's immune system until it becomes so depressed that a limitless number of life-threatening infirmities may occur. Levine, *Acquired Immunodeficiency Syndrome: The Facts*, 65 S.Cal.Rev. at 429. The period in which the virus incubates is indeterminate. It may be as short as one year and can extend as long as fourteen years. Note, *Standards of Conduct, Multiple Defendants, and Full Recovery of Damages in Tort Liability for the Transmission of Human Immunodeficiency Virus*, 18 Hofstra L.Rev. at 44 n.38; Note, *Tort Liability for the Transmission of the AIDS Virus: Damages for Fear of AIDS and Prospective*

(Cont'd)

trial court expressly affirmed the constitutionality of O.C.G.A. §§ 9-3-71 and 9-3-73, rejecting petitioners' equal protection and due process challenges.

On February 27, 2006, the Supreme Court of Georgia, vested with exclusive jurisdiction to hear appeals involving constitutional attacks on Georgia statutes, declined jurisdiction in this case holding *sua sponte* and without benefit of briefs that the constitutional challenges of petitioners to O.C.G.A. §§ 9-3-71 and 9-3-73 on equal protection and due process grounds had already been decided adversely to petitioners in prior decisions, precluding further constitutional review.

In their timely filed motion for reconsideration, petitioners urged that (1) in prior review of these statutes, while articulating a "substantial relation" test, the Georgia Supreme Court nonetheless had improperly applied a rational basis test in affirming their constitutionality under the equal protection and due process of clauses of the Fourteenth Amendment of the U.S. Constitution and of the Georgia Constitution; (2) other state supreme courts and federal courts had invalidated similar statutes under both rational basis and heightened intermediate scrutiny analysis; and (3) the statutes could not be constitutionally or rationally conformed to other Georgia statutes which protect the rights of minors, toll their claims in other contexts until the age of majority, and acknowledge that minors are incapable of protecting themselves.[10] In short,

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(Cont'd)

AIDS, 45 Wash. & Lee L.Rev. 185, 186 n.4 (1988). Because of its inherent latency, HIV will likely be undetected for a long period of time. Thus, in cases such as this, where HIV has been transmitted through a blood transfusion, the discovery rule is particularly applicable since the prospective plaintiff will have no indication that he carries the virus. *Murray v. Hamot Medical Center*, 633 A.2d 196, 200 (Pa. 1993).

10. O.C.G.A. § 1-2-8 provides that minors are incapable of protecting their rights. Infants must sue through a guardian or next friend, and the law recognizes that a parent or nearest relation may neglect to protect the infant's rights. *See Sanders v Hinton*, 156 S.E. 812, 815 (Ga. 1931). A minor's suit not brought through a guardian or next friend is an amendable defect in the record. O.C.G.A. § 9-2-28. Claims of minors are tolled until the age of majority. O.C.G.A. § 9-3-90 (except in medical malpractice cases). The age of majority in Georgia is eighteen. O.C.G.A. § 39-1-1.

petitioners argued that all claims of Derek Canas should be tolled until he reached the age of majority on November 1, 2002, or, alternatively, until he discovered that he had AIDS in April 2001, and because the statutes in question do not so allow, they are unconstitutional. This motion for reconsideration was denied on April 13, 2006. The motions, briefs and pleadings upon which this statement of the case is based are currently in the record on file with the Georgia Court of Appeals.

REASONS FOR GRANTING THE PETITION

Medical malpractice statutes of limitations and repose in Georgia and in numerous other states override tolling statutes which recognize that minors are incompetent or unable to vindicate their rights. The statutory scheme at issue here is widely replicated and the constitutional analysis of it across the nation is uneven and conflicted. O.C.G.A. § 9-3-71 produces manifestly unjust and arbitrary results because the repose period is triggered by a medically "negligent act" which Georgia courts have recognized is not routinely known to the patient and the limitations period is triggered by an "injury" which may also be unknown to the patient. O.C.G.A. § 9-3-73 enacted two years later then divested children of the protection of a law which otherwise tolls their claims until age of majority. This challenged statute, for example, forces infants to sue for medical injuries by their seventh birthday when most are unable to communicate medical concerns effectively and none have the legal capacity to sue.

When confronted with constitutional challenges to conceptually indistinguishable statutes, state and federal courts in some jurisdictions have determined that such statutes deny equal protection or due process of law under those clauses in the Fourteenth Amendment or like provisions in state constitutions.[11] Georgia is among other states reaching a

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11. *See, e.g., Austin v. Litvak*, 682 P.2d 41 (Colo. 1984), invalidating both statute of repose and limit of discovery rule to foreign object cases under state rational basis equal protection analysis tracking federal analysis: "[I]n both 'foreign object' and 'negligent misdiagnosis' cases the injured persons are wholly innocent and may, through no fault of their own, fail to discover their injury prior to the running of the statute of limitations." *Id.* at 52-53.

contrary conclusion. The contradictory and irreconcilable constitutional results among the states often depend upon whether the medical malpractice statutory scheme receives heightened intermediate scrutiny or the "rational basis" analysis employed in Georgia.

A sampling of decisions from Texas, Ohio, Colorado, New Hampshire and others repudiating Georgia's constitutional position is provided hereinafter. This Court should grant the writ of certiorari to resolve the conflict; otherwise, the same statutory scheme which fails Fourteenth Amendment analysis elsewhere paradoxically comports with equal protection and due process in Georgia — an anomaly which the Fourteenth Amendment cannot countenance.

O.C.G.A. § 9-3-73 was held to override the general statute tolling minors' claims and survived a Fourteenth Amendment equal protection and due process challenge in *Smith v. Cobb County-Kennestone Hospital Authority*, 423 S.E.2d 235 (Ga. 1992). The current version of O.C.G.A. § 9-3-71 also survived an equal protection challenge in *Craven v. Lowndes County Hosp. Auth.*, 437 S.E.2d 308 (Ga. 1993). Both statutes survived a further Fourteenth Amendment challenge in *Crowe v. Humana*, 439 S.E.2d 654 (1994). These decisions, which foreclosed petitioners' challenge, employed "rational basis" constitutional analysis.

In *Craven, supra* three of the seven justices dissented and would have invalidated O.C.G.A. § 9-3-71(b) under a heightened "intermediate scrutiny" test instead of the majority's rational basis test, finding that the right to sue for personal injuries is "an important substantive right," and urging the analysis employed by the New Hampshire Supreme Court, which invalidated a conceptually indistinguishable statutory scheme in *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980). The *Craven* dissent would have employed heightened scrutiny analysis, not because the claimant was a minor, but because the statute restricted patients' rights to sue for personal injuries when compared to the rights accorded other personal injury claimants.

These Georgia decisions cannot be constitutionally reconciled with the strictures of the Fourteenth Amendment

or Georgia precedent which in *Shessel v. Stroup*, 316 S.E.2d155 (Ga. 1984), invalidated the earlier 1976 version of O.C.G.A. § 9-3-71 on equal protection grounds. Exactly like the current five year period of repose embodied in the same code section, the earlier version of the law (a limitations statute with no "repose" provision) barred medical malpractice claims filed more than two years after the pertinent *negligent act*. *Shessel* determined that the statute was a denial of equal protection because some medical claims did not give rise to a manifest injury until more than two years after the antecedent negligent act.

The current statutes also present a constitutional conflict with other Georgia limitation laws because only in medical malpractice cases does a statute of limitations or repose begin to run from the date of an undiscovered negligent act. *Simmons v. Sonyika*, 614 S.E.2d 27 (Ga. 2005).[12] Unlike these laws, the general statute of limitation for injuries to the person is two years from when the "right of action accrues" under O.C.G.A. § 9-3-33 (as had been the case for medical malpractice actions prior to 1976) upon which is a judicially engrafted discovery rule.[13] A statutory discovery rule in O.C.G.A. § 9-3-72 obtains only in surgical cases where a foreign object is left in the patient. *Simmons* held that non-discovery of the negligent act will not toll the statute. *Id.* at 29. Denuding these statutes of a discovery rule applicable to non-medical limitations is arbitrary, unconscionable and denies due process because patients, particularly minor ones, lack the competence and the education to discern when a medically negligent act has occurred, and children have no ability to ensure the protection of their rights by age seven or ten, as O.C.G.A. § 9-3-73 prescribes. The holding in *Simmons* and the refusal by the Supreme Court of Georgia to entertain any further

12. Georgia a has ten year statute of repose for injuries arising from a defect in building triggered by the date of "substantial completion" and a ten year statute of repose in a product liability case triggered by the date of first sale. These triggers are readily discernible to a lay person and distinguishable from a trigger premised on a medical provider's negligent act.

13. *See Welch v. Celotex Corp.*, 951 F.2d 1235 (11th Cir. 1992) (applying Georgia law); *King v. Seitzingers, Inc.*, 287 S.E. 2d 252 (Ga. Ct. App. 1981)

constitutional challenge to these statutes effectively leaves many patients, mostly children, with no rights or remedies for medical negligence, denying them equal protection and due process of law.[14]

I. Review is Warranted Since the Challenged Statutes Violate the Fourteenth Amendment By Mandating that Minors Sue for Medical Malpractice when Georgia Law Otherwise Recognizes that Minors are Incapable of Protecting Their Own Rights, Lack the Capacity to Sue, and Have Their Claims Tolled Until Age of Majority.

A. Georgia's Constitutionally Flawed Statutes in Historical Context .

For personal injury causes of action, Georgia employs a two-year statute of limitation which commences when the cause of action "accrues."[15] That statute embraces the concept of a continuing tort[16] and has been held not to commence until the plaintiff both discovers his or her injury and the causal connection to defendant's conduct. *See Welch v. Celotex Corp.*, 951 F.2d 1235 (11th Cir. 1992) (applying Georgia law).

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14. By way of contrast, the Indiana Supreme Court in *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999) held that state's medical malpractice statute of limitations unconstitutional in application to an undiagnosed breast cancer patient whose disease remained latent for longer than the statutory period. The court stated: "The Framers of our Constitution would have concurred with Justice Jerome Frank's Alice-in-Wonderland notion on the absurdity of applying a medical malpractice statute of limitations in cases such as this. . . ." *Id.* at 1283 n.12. The Supreme Court of Georgia has persistently refused to entertain constitutional challenges to these statutes and this Court declined to hear an intermediate scrutiny challenge in a fetus wrongful death case in 1997, which did not raise the constitutional argument as applied to minors and when the only conflicting out-of-state case cited was *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980). *See Thompson v. Long*, 484 S.E.2d 666 (Ga. App. Ct. 1997), *cert. denied* by Supreme Court of Georgia (unpublished opinion), *cert. denied*, 522 U.S. 1147 (1998).

15. O.C.G.A. § 9-3-33.

16. *See Everhart v. Rich's, Inc.*, 194 S.E.2d 425 (Ga. 1972). Petitioners argued that the continued failure to diagnose AIDS was a continuing tort. However, the Supreme Court of Georgia has also foreclosed the application of the analogous continuous treatment rule to extend the statute of limitations in continuing mis-diagnosis cases in *Young v. Williams*, 560 S.E. 2d 690 (Ga. 2002).

Different limitations legislation for medical malpractice cases appeared in Georgia in 1976, but the law did not survive constitutional challenge in *Shessel*, where the court applied a "substantial relation analysis" but then commingled it with "rational basis" equal protection analysis. The court cited *Reed v. Reed*, 404 U.S. 71, 76 (1971) as support for the test applied.[17] Earlier, in *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981), the court had differentiated the "substantial relation to an important governmental objective" test from the "rational basis" test, suggesting clear delineation of heightened intermediate scrutiny equal protection analysis. The court in *Shessel*, while invoking "substantial relation" verbiage, did not recite *McDaniel* or refer explicitly to "intermediate scrutiny."

The 1976 version of O.C.G.A. § 9-3-71 invalidated by *Shessel* under the equal protection clause had a two-year limitation which commenced on the date of the physician's "negligent act or omission," instead of when the cause of action accrued, the prior rule in Georgia for all personal injury cases including medical malpractice.[18] That version of the statute contained no "repose" provision. Medical malpractice claims for minors remained tolled until the age of majority, as was the case in other tort contexts.

In the aftermath of *Shessel*, O.C.G.A.§ 9-3-71 was amended in 1985 to its current version which starts the limitation period from the date of "injury." However, the legislation added a new five year statute of "repose," which, just like the former statute of "limitations," was triggered by a negligent act or occurrence. So, the new statute of "repose" was conceptually identical to the old constitutionally infirm statute of "limitations," only it changed the limitation period from two to five years.

In 1987, Georgia then passed O.C.G.A. § 9-3-73, which for the first time imposed a laddered scheme of limitations/repose on children, requiring infants under five to sue for injuries within

17. *Reed* invalidated an Idaho statute which discriminated based on gender. The Court stated that "a classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" 404 U.S. at 76.

18. *See*, n.15 *supra*.

two years of their fifth birthday and a statute of repose for the same children tied to their tenth birthday. This statute was held to trump the general tolling provision for claims of minors in O.C.G.A. § 9-3-90. *Smith*, 423 S.E.2d at 238. The repose provision also was held not to toll medical negligence until discovered, and survived the constitutional equal protection challenge. The court recited the words "substantial relation to the object of the legislation," but then employed the rational basis test. *Id.*[19]

When next confronted with a challenge to the five year statute of "limitations," now called a statute of "repose," the Supreme Court of Georgia again upheld the current statute. *Craven, supra* at 309. The "substantial relation" words invoked in *Shessel* were repeated, but the rational basis test was employed. The majority recognized only a two-tiered constitutional analysis, having forgotten *McDaniel*. "Intermediate scrutiny" was treated as a new idea in the dissent and remains in Georgia an elusive, unemployed curiosity.

Justice Benham, who wrote the dissenting opinion in *Craven*,[20] *sua sponte* suggested that an intermediate level of scrutiny should be employed, citing *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980). Applying heightened intermediate scrutiny, the dissenting justices would have stricken the statute of repose as a violation of Fourteenth Amendment equal protection, viewing it as unreasonable and arbitrary because acts of medical negligence might not be manifest in five years. *Id.* at 312. Again, *Shessel* was not invoked as precedent for that test by anyone on the court, nor was *McDaniel* mentioned either. The majority decided that since the patient was not in a "suspect" class, the rational basis test applied instead of the "strict scrutiny" test, viewed as the only alternative. *Id.* at 310.

The dissent was also without reference to the age/minor issue; rather, it focused on how the statutes curtail the rights of patients to sue, "an important substantive right."[21] Had the

19. *Accord, Crowe v. Humana*, 439 S.E. 2d 654 (Ga. 1994).

20. Justices Hunstein and Sears also dissented, resulting in a 4-3 majority opinion.

21. *Cantrell v. Thurmond*, 499 S.E.2d 416, 421 (Ga. Ct. App. 1998) held that the right to medical care is a "fundamental right," arguably supporting heightened scrutiny for statutes denying redress where competent medical care is not provided.

Craven court acknowledged that "substantial relation" meant "heightened intermediate scrutiny," per *McDaniel*, the outcome should have been a unanimous decision invalidating the challenged statutes.

By changing the label from "limitations" to "repose" and extending the time limitation from two to five years, what had been irrational to the Supreme Court of Georgia became rational. By foreclosing further constitutional challenge to these statutes in its Order of February 27, 2006, and by holding in *Simmons, supra*, that these statutes run even without discovery of the negligent act, Georgia continues to leave many patients, mostly children, without any rights or remedies for medical negligence and at a constitutional dead end. Patients with AIDS, cancer and any number of other progressive diseases may not evidence a substantive injury within two years nor be able to discern a latent medical error within five years.

B. The Analysis in *Smith v. Cobb County-Kennestone Hosp. Auth.* Should Not Have Foreclosed Constitutional Scrutiny in this Case .

The *Smith* decision, invoked by the Georgia Supreme Court to bar constitutional consideration of petitioners' claims, cannot be reconciled with that court's prior declaration in *Shessel* that the 1976 version of O.C.G.A. § 9-3-71 was an unconstitutional denial of equal protection because the limitation period ran from the date of the negligent act and the negligent act was undiscovered during the statutory period. The resultant injury in *Shessel* did not even occur until after the period expired. Thus, the former law – which on its face would have barred the claim in *Shessel* before any injury or damage occurred – was an unconstitutional denial of equal protection. In support of its holding, the court observed that under the general personal injury statute of limitations the time for filing an action did not begin to run until the cause of action accrued on the date of injury. The fact that the legislature now called a once constitutionally infirm statute of limitations a statute of "repose" was inexplicably sufficient in *Smith* to cure the infirmity.

The court in *Smith* then decided that the due process rights of children were adequately safeguarded under O.C.G.A. § 9-3-73 because a next friend or representative could bring the suit under O.C.G.A. § 9-11-17(c). The court ignored its historical recognition that a parent or next friend might neglect to protect the infant. *See Sanders v. Hinton*, 156 S.E. 812, 816 (1931). The referenced statute, while requiring a parent or guardian to be appointed in a child's lawsuit, does not require that a parent or guardian actually bring such a lawsuit on behalf of a child. It does not bridge the mandate of O.C.G.A. § 9-3-73, which forfeits the child's medical malpractice right of action if it is not brought within the prescribed time limitation. The *Smith* decision did not even advert to O.C.G.A. § 1-2-8, which provides that minors are incapable of protecting their rights.[22]

Smith also ignored Georgia cases which further undermine its analysis. In 1854, the Georgia Supreme Court held that "no court before which the statute of limitations may be relied on, shall be permitted to construe it against . . . infants." *Bush v. Lindsey*, 14 Ga. 687, 688 (1984). In *Barnum v. Martin*, 219 S.E.2d 341 (Ga. Ct. App. 1975), the court made plain that limitations will not run against a minor even if represented in litigation by a next friend or guardian *ad litem*. The failure of a guardian to protect the interest of a minor will not operate to the prejudice of the minor. *Monroe v. Simmons*, 12 S.E. 643 (Ga. 1890). *Smith* does not, because it cannot, answer how children who are incompetent and incapable of protecting their rights in other civil matters became competent and capable of doing so in medical malpractice cases.

Finally, the *Smith* decision's flawed "rational basis" equal protection analysis concludes that a separate classification for minors is rational to protect against stale claims. Yet, in *Clark v. Singer*, 298 S.E.2d 484 (Ga. 1983), the court as in *Shessel* found the former version of O.C.G.A. § 9-3-71 to be unconstitutional

22. Nor did the *Smith* court consider O.C.G.A. § 9-11-9.1, which imposes a further barrier to the rights of minors/patients by imposing an expert affidavit requirement to establish a medical act or omission as a condition precedent to a claim under Georgia law. This latter statute underscores the fact that for a patient to even assert a claim for medical negligence requires the professional analysis of another doctor.

under the Fourteenth Amendment because it barred a wrongful death claim where the act of medical negligence occurred more than two years prior to death, while claims for wrongful death due to other causes could be brought within two years of the death. The court found that the purpose of statutes of limitations was to avoid slumbering claims by putting defendants on notice through the filing of a lawsuit within the prescribed period. The court held that a claim which had not yet arisen *"has not been slumbering and is not stale."* (Italics added.) *Id.* at 485. Differentiating wrongful death medical cases from other civil death cases was thus irrational and denied equal protection of the law.

The cases invalidating the earlier version of O.C.G.A. § 9-3-71 and validating the current statutes provide antithetical and irreconcilable constitutional analysis. By approving a legislative name change from "limitations" to "repose," and by vesting patients and children with notice of undiscovered medical negligence when they have none, slumbering claims became stale even before they could be brought. Due process and equal protection in Georgia medical negligence cases became constitutional relics.

II. Review is Warranted Because the Georgia Medical Malpractice Statutes of Limitations/Repose Are Held to Run Even Where the Patient Has Not Discovered Either the Negligent Act or the Resultant Injury.

Georgia affords a statutory discovery rule only to surgical patients who have foreign objects left in them. O.C.G.A. § 9-3-72.[23] Had a clamp been left in Derek Canas during heart surgery in 1985 (as opposed to the HIV virus) and been discovered in April, 2001, his right of action against the surgeon would be fully protected.

While a statute of repose on occasion is triggered by an event which takes place before a cause of action accrues, the complexities of medicine do not routinely make plain the triggering medical error or omission. Patients, particularly infant ones, cannot interpret lab results, blood work, MRIs or

23. This statute is incorporated by reference into O.C.G.A. § 9-3-73. The previous indistinguishable version of this "foreign object" statute was held constitutional against equal protection and due process attacks in *Allrid v. Emory University*, 285 S.E 2d 521 (Ga. 1982).

CT scans. The doctor, not the patient, is the repository of the telltale medical record. This Court has recognized that in the context of medical malpractice, a patient's ignorance of his legal rights should not prevent the running of a statute of limitations, but ignorance of the fact of his injury or its cause stands on different footing. *See United States v. Kubrick*, 444 U.S. 111, 119-122 (1979). These same precepts apply to torts in Georgia, except those involving medical malpractice.[24]

This Court also has held in the context of the Federal Employers Liability Act, that statutes of limitations are presumably not intended to attach to "blameless ignorance," but rather contemplate the assertion of claims within a specified period of time after "notice" of the invasion of legal rights. *Urie v. Thompson*, 337 U.S. 163, 170 (1949).[25] The Georgia statutes run in spite of blameless ignorance and in the absence of notice to the patient of the medical error. *Simmons*, 614 S.E. 2d at 29.[26]

Another line of Georgia appellate decisions holds that in a mis-diagnosis case, the mis-diagnosis is not only the negligent act, but also the "injury," rather than the subsequent discovery of the correct diagnosis.[27] The trial court's orders

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24. *See* n.13 *supra.*

25. *Id.* at 168-71 (declining to construe statute of limitations to bar a claim which asserted that the inhalation of silica dust resulted in silicosis, because to bar the suit would be to require the claimant to file a claim during the limitations period and before the symptoms were apparent and would be to charge the claimant with knowing the "inherently unknowable," that is, "the slow and tragic disintegration of his lungs"); *see Burgess v. United States*, 744 F.2d 771, 773 and 774 n.5 (11th Cir. 1984) citing Restatement (2d) of Torts § 889, comment e, p. 444-445 (1979) (limitation should not run where plaintiff has no knowledge of the injury) "the character of the injury will frequently prevent knowledge of what is wrong, so the plaintiff is forced to rely upon what he is told by the physician . . ."

26. *Accord, Crowe v. Humana*, 439 S.E.2d 654 (Ga. 1994).

27. *See Kane v. Shoup*, 580 S.E.2d 555 (Ga. Ct. App. 2003); *see also Hughley v. Frazier*, 562 S.E.2d 821 (Ga. Ct. App. 2002); *Oliver v. Sutton*, 540 S.E.2d 645 (Ga. Ct. App. 2000); *Frankel v. Clark*, 444 S.E.2d 147 (Ga. Ct. App. 1994); *Zechman v. Thigpen*, 437 S.E.2d 475 (Ga. Ct. App. 1993).

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below completely ignored the petitioners' lack of notice or knowledge that Derek Canas had AIDS prior to April 2001. The statutes of limitations and repose were applied by counting backward the requisite number of years from the filing of the complaint (two year for injuries, five years for negligent acts) without reference to the minority of Derek Canas or his family's ignorance of the malpractice continuum or resultant injuries.

Applying a discovery rule for personal injury cases generally and to foreign object medical malpractice cases, while stripping that concept from other medical cases, is at odds with precepts of due process or equal protection. New Hampshire invalidated its statute which allowed a discovery rule only in foreign object cases in *Carson*, as did Colorado in *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984); other states have found constitutional shortcomings in special medical statutes of limitations which lack a discovery rule to protect latent claims.[28]

III. Review is Warranted Because There is No Uniformity Among State and Federal Courts Concerning the Constitutionality of Similar Medical Malpractice Statutes Or Whether Heightened Constitutional Scrutiny Should be Applied.

A. The Due Process Conflict.

In *Jaramillo v. Heaton*, 100 P.3d 204 (N.M. Ct. App. 2004), *cert. denied*, 101 P.3d 807 (N.M. 2004), the New Mexico Court of Appeals held that a medical malpractice statute of repose which required a minor subjected to malpractice before the age of six to bring a claim by his or her ninth birthday violated the due process clause of the Fourteenth Amendment. New Mexico, like Georgia, otherwise recognized that minors were

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By way of contrast, under California law the injury in an AIDS case has been held to be the discovery of the condition through a positive HIV test. *See Katz v. Children's Hosp. of Orange County*, 28 F.3d 1520 (9th Cir. 1994) (invalidating portion of California medical malpractice statute of limitations as discriminating against minors under rational basis analysis).

28. *See, e.g., Katz* (California), *supra* n. 27; *Martin* (Indiana), *supra* n.14.

incompetent or disabled until age of majority. The court's rationale included consideration of whether the statute accorded the minor child adequate notice and time to bring a claim. The Georgia statute of repose, triggered by a negligent act or omission, provides no right or remedy at all if the resultant injury does not become manifest until after the time period has expired. Patients, particularly minor ones, routinely have no notice of a doctor's negligent act nor notice prior to diagnosis of a resultant latent injury in progressive disease cases such as cancer or AIDS.

As the New Mexico court noted, a parent is permitted to make the child's health care decisions, but is not required to bring a cause of action on the child's behalf. Forcing a child to bring an action by age nine, even if the child had a competent parent or guardian unreasonably did not assure time for filing suit to protect the child's rights.

In *Smith*, the Georgia Supreme Court upheld O.C.G.A. § 9-3-73, employing what it called "procedural" due process analysis and reaching a conclusion which is a direct contradiction to New Mexico's conclusion that a conceptually identical statute denies due process under the Fourteenth Amendment.[29] Georgia's superficial analysis decided that because a parent or guardian might act to preserve the child's claim, due process was satisfied.

B. The Equal Protection Conflict .

In *Lyons v. Lederle Laboratories*, 440 N.W.2d 769 (S. D. 1989), the Supreme Court of South Dakota held unconstitutional on equal protection grounds a statutory scheme which required a minor of less than six years of age to bring an action within two years of his sixth birthday. The South Dakota court held

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29. Federal due process requires a non-criminal statute to have language which conveys a sufficiently definite warning of the proscribed conduct when measured by common understanding and or practice. *See, e.g., Horn v. Burns and Roe*, 536 F.2d 251, 254 (8th Cir. 1976) (citations omitted). Substantive due process is a guaranty against arbitrary or unreasonable legislation which must have a substantial relation to the object sought to be obtained. *Ingraham v. Wright*, 525 F.2d 909 (5th Cir 1976), *aff'd*, 430 U.S. 651 (1977). Patients routinely lack notice of "negligent acts" and often suffer latent "injuries" from them. Thus, simple words in the statutes are vague, and arbitrary when applied.

that the medical malpractice statutory scheme created an arbitrary classification of minors who had medical malpractice claims as opposed to minors with any other kind of tort claim. It struck down the statute using the rational basis test. The proffered legislative rationale for the South Dakota statute was substantially the same as the rationale recited in O.C.G.A. § 9-3-73(f). In *Austin, supra*, the Colorado Supreme Court agreed that a three year medical malpractice statute of repose did not satisfy state rational basis equal protection analysis in latent negligent mis-diagnosis cases.

C. Other States Also Have Concluded That Similar Laws Do Not Withstand Due Process or Equal Protection Analysis .

Texas, Arizona, Utah and Ohio, by way of further example, have all stricken medical malpractice statutes of limitations or repose, which trump tolling provisions otherwise protecting minors, employing due process or equal protection analysis.[30] While these results are sometimes reached under state constitutions, most states, including Georgia, have constitutional due process and equal protection provisions which parallel the Fourteenth Amendment.

Virtually all of these statutes are justified upon the same grounds recited in O.C.G.A. § 9-3-73(f). In many of these cases, the legislative rationale for the statutes, to wit, an alleged medical malpractice crisis or rising insurance premiums, etc., has been analyzed and repudiated.[31] Elimination of "stale

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30. *See Sax v. Votteler*, 648 S.W.2d 661, 666-67 (Tex. 1983); *Kenyon v. Hammer*, 688 P.2d 961, 976 (Ariz. 1984); *Lee v. Gaufin*, 867 P.2d 572 (Utah 1993); *Schwan v. Riverside Methodist Hosp.*, 452 N.E.2d 1337 (Ohio 1983); and *Mominee v. Scherbarth*, 503 N.E.2d 717 (Ohio 1986).

31. In *Monimee v. Scherback*, 503 N.E. 2d 717, 724 (Ohio 1986), citing the AMA's own survey, the court noted that average premium costs as a percentage of a physician's gross income were about 3.7% in 1983, down from 4.4% in 1976. Quoting a 15-year study of malpractice claims and premiums, the court found that the insurance industry's natural behavior contributes to the continuing cycles of "crisis" and "remission." The high investment yields of the early 1980s led to an influx of new carriers and price cutting. In 1984, the strong dollar reduced the amount of insurance and reinsurance capacity outside the U.S. and emerging losses finally forced companies to raise premiums. Posner, *Trends in Medical Malpractice Insurance*

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claims," high insurance premiums and a medical malpractice "crisis" are typically recited rationales for these laws.[32]

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1970-1985, 49 Law and Contemp. Problems 37, 48 (Spring 1986). More recently, a University of Texas collaborative study found no evidence of a crisis in that state nor any material connection between claim costs and premium fluctuations. *See* Bernard Black, Charles Silver, David A. Hyman, and William M. Sage, *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. of Empirical Legal Studies, at 207 (July 2005). "But the more likely explanation is that much of the rise in premiums reflects insurance market dynamics, not litigation dynamics." *Id.* at 210.

32. *In Hoem v. State*, 756 P.2d 780, 783 (Wyo. 1988), the Supreme Court of Wyoming said this about a law creating a medical review panel in reaction to "skyrocketing insurance premiums" and a perceived, but unproven, crisis:

> . . ."It cannot seriously be contended that the extension of special benefits to the medical profession and the imposition of an additional hurdle in the path of medical malpractice victims relate to the protection of the public health. To the contrary, . . . if the medical profession is less accountable than formerly because of the special treatment it is afforded by [medical review panel] laws, then a relaxation of medical standards may occur with the public as the victim. '[T]o find that the protection and special dispensation given to health delivery tortfeasors by the challenged legislation is in the best interest of public health is illogical to the point of irrationality.'" *Boucher v. Sayeed*, R.I., 459 A.2d 87, 94 (1983) (quoting from *American Bank & Trust Co. v. Community Hospital of Los Gratos-Saratoga, Inc.*, 104 Cal. App. 3d 219, 163 Cal.Rptr 513, 522 (1980)) . . .
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> We have said previously that "[t]he continued availability and vitality of *** causes of action [against health care providers] serve an important public policy- the preservation of quality health care for the citizens of this state." In light of this basic truth, we hold that the legislature's attempt to limit or reduce such causes of action is not rationally re[illegible]ed to a legitimate state interest.

Our holding th[illegible] the act is not rationally related to protection of the public health or economic and social stability of the state would be sufficient alone to find the act unconstitutional. However, we also are persuaded by the principle that:

> "[C]onstitutional protections are not suspended in time of even the most legitimate crisis. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589, 72 S.Ct. 863, 867, 96 L.Ed. 1153 (1952) (constitutional provisions exist 'in good and bad times'); cf. Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944) (since discredited-internment of Japanese descendants during war); *Konigsberg v. State*

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Discriminating against minors and patients subjected to latent medical errors or who suffer latent "injuries" as a consequence is not a rational way to curb the excesses of the civil justice system.[33]

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Bar [of California], 353 U.S. 252, 77 S.Ct. 722, 1 L. Ed. 2d 810 (1957) (fear of communism). Constitutional protections exist for litigants regardless of market conditions for insurance companies and the medical industry; concerns about the latter cannot be allowed to overrun the former at the expense of those *** injured by acts of malpractice." *Waggoner v. Gibson*, 647 F. Supp. 1102 (N.D. Tex. 1986).

. . . We cannot condone the legislature's use of the law to protect one class of people from financial difficulties while it dilutes the rights under the constitution of another class of people. Every profession confronts financial distress at some time, and that does not justify depriving others of the equal protection guaranteed by the constitution . . .

In holding as we do that the act denies equal protection of the law...we are cognizant that the majority of states have upheld similar provisions. However, we find the following language to be convincing:

"Most state courts give considerable deference to the state legislatures' specific declarations in statutes that such a crisis does exist and that the substantive portions of the statute are intended to alleviate that crisis. A better approach for those courts that have yet to decide the issue would be, however, to take a more skeptical attitude toward the evidence presented by the medical profession and the insurance industry and toward the conclusion reached by the state legislature regarding the existence of a crisis.

State courts that have swept aside the equal protection argument have seriously shirked their judicial responsibilities. *Proper scrutiny of the constitutional validity of state legislation demands more than a perfunctory deferral to the legislature's conclusions regarding the existence of a health care crisis* in the particular state." *Comment, Constitutional Challenges to Medical Malpractice Review Boards*, 46 Tenn.L.Rev. 607, 645 (1978).

33. *See, e.g., Kenyon v. Hammer*, 688 P.2d 961, 992 (Ariz.1984):

Arizona has neither a compelling nor legitimate interest in providing economic relief to one segment of society by depriving those who have been wronged of access to and remedy by the judicial system. If such a hypothesis were once approved, any profession, business or industry experiencing difficulty could be made the beneficiary of special legislation designed to ameliorate its economic adversity by limiting access to the courts by those who have been damaged. Under such a system, our constitutional guarantees would be gradually eroded until this state became no more than a playground for the privileged and influential.

D. Heightened Scrutiny Applied to Patients .

In *Coburn v. Augustin*, 627 F. Supp. 983 (D. Kan. 1995), the court struck down a Kansas medical malpractice statute abrogating the collateral source rule only in medical malpractice actions under the equal protection clause. That court cited a number of cases which applied "heightened" scrutiny to strike down different types of medical malpractice legislation, and a longer list of decisions employing rational basis analysis to uphold such statutes. *Id.* at 990, 992. Most of the cited cases applying heightened scrutiny did so because the laws abridged or trumped tolling provisions otherwise applicable to minors, as does the Georgia statutory scheme. Nevertheless, the *Coburn* court concluded that medical malpractice victims generally have no control over the inception of their afflictions and are relegated to a position of political powerlessness. The court then extended "heightened rational basis" scrutiny to legislation curtailing the rights of medical malpractice patients as opposed to other tort victims.

In *Carson, supra*, the New Hampshire Supreme Court invalidated a medical malpractice statute of limitations provision which required minors to sue at certain prescribed ages when New Hampshire otherwise tolled the tort claims of infants until age of majority. The court employed heightened intermediate scrutiny analysis. The court also invalidated a statute affording a discovery rule in medical malpractice cases only to plaintiffs who discovered the presence of a foreign object in their body after surgery. That offending statute, like its Georgia counterpart, is not limited in its application to minors.

The Supreme Court of Georgia, in *McDaniel, supra* at 161, validated intermediate scrutiny and recognized that "the 'equal protection' provisions of the Georgia Constitution . . . ,[34] though employing different phraseology than the Fourteenth Amendment, 'are substantially equivalent of equal protection of the laws under the U.S. Constitution.'" As already

34. *Id.* Yet in *Shessel v. Stroup*, 316 S.E.2d 155 (Ga. 1984) and again in *Clark v. Singer*, 298 S.E.2d 484 (Ga. 1983) both of which found the prior version of O.C.G.A. § 9-3-71 to be constitutionally infirm, the court bleeds the "substantial relation" test into rational basis analysis, ignoring the *McDaniel* differentiation.

explained, the dissenting justices in *Craven*, would have applied heightened intermediate scrutiny to invalidate these statutes because they impair the rights of patients to sue, not because the claimant may be a child. Yet, the *Craven* majority incorrectly announced that the only choice was between strict scrutiny and rational basis analysis, opting for the latter.

E. Heightened Intermediate Scrutiny is Mandated for Statutes Abridging the Rights of Minors .

There is clear constitutional authority throughout the United States for the application of heightened intermediate scrutiny to statutes which abridge the rights of minors. For example, in *Ramos v. Town of Vernon*, 353 F.3d 171 (2d Cir. 2003), the court provided a detailed analysis of the three levels of scrutiny before concluding that heightened intermediate scrutiny was required of an ordinance curtailing the rights of children.[35] The court stated:

> It bears repeating that to satisfy intermediate scrutiny, the state must show that the challenged classification serves 'important governmental objectives and that the discriminatory means employed [are] substantially related to the achievement of those objectives.' *Wengler*, 446 U.S. at 150. In the context of minors' rights, an important governmental objective would, at the very least, address the vulnerabilities particular to minors.

Id. at 180.[36] The court duly noted that minors have no voice in the legislative process and are relegated to a position of political powerlessness. *Id.*

In *Lee v. Gaufin*, 867 P.2d 572 (Utah 1993), the Utah Supreme Court applied heightened scrutiny to invalidate a medical malpractice statute which, like the Georgia statute, withdrew the prior tolling protection for minors:

> Historically, the law has recognized that special rules are necessary for children. In this and other states,

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35. Citing *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) for the proposition that minors occupy a unique position in our constitutional scheme.

36. This case also cites *Clark v. Jeter*, 486 U.S. 456, 461 (1988) and *Craig v. Boren*, 429 U.S. 190, 197 (1976) in support of the view that "quasi-suspect" classifications or "important" rights may invoke an intermediate level of scrutiny.

> courts and legislatures have generally conferred a special status on minors with respect to their legal capacity to sue and be sued. Because of their lack of experience, judgment, knowledge, resources, and awareness, minors cannot effectively assert and protect their legal rights. That is especially true in the context of medical malpractice lawsuits with respect to infants who suffer physical, mental, or emotional injuries that are not apparent and cannot be discerned or communicated by the infant until he or she reaches a later stage of development and is more mature.

Id. at 578. The court observed that this Court "has applied a stricter standard of scrutiny in a number of federal equal protection cases involving the rights of children, although none involved a state medical malpractice act." *Id.* at 583.[37]

The court in *Gaufin* then analyzed the shortened limitations period which Utah's medical malpractice statutes applied to minors as follows:

> [It] not only treats minors injured by a healthcare provider categorically different from minors injured by all other defendants, but it also treats minors and adults as if they were situated the same under the law. Minors and adults are not, however, similarly situated under the law with respect to their ability to assert a claim for injuries caused by malpractice. Minors, unlike adults, have no legal capacity to sue. Their legal incapacity is based on fundamental differences between adults and minors with respect to their

37. Citing *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) ("If the State is to deny a discrete group of innocent children [undocumented children] the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest."); *Lalli v. Lalli*, 439 U.S. 259, 268 (1978) ("We are asked to decide whether the discrete procedural demands that [a descent and distribution statute] places on illegitimate children bear an evident and substantial relation to the particular state interests this statute is designed to serve."); *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (scrutiny of classifications based on illegitimacy is "not a toothless one"); and *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 172 (1972) ("when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny").

> physical, intellectual, psychological, and judgmental maturity. If the law failed to recognize those differences, the legal rights of minors could be exploited unconscionably and the law made an instrument of oppression as to the legal rights of minors.

Id. at 577. The court examined the legislation's stated purposes, including counteracting increased health care costs and physician attrition said to have resulted from increased malpractice claims and judgments. *Id.* at 583 n. 17. Citing a report of the National Association of Insurance Commissioners ("NAIC") and a report by the U.S. Department of HEW[38], the court concluded that long-tail claims for injuries to minors had a comparatively minor impact on medical malpractice insurance costs:[39]

> [T]he nonuniform application of the limitations provisions . . . to minors' malpractice claims does not actually and substantially further the policy of curbing and reducing malpractice premiums and of ensuring reasonably priced health-care service to the people of Utah and is not necessary to accomplish those ends. Furthermore, even if there were evidence of significantly increased malpractice lawsuits or increased jury verdicts in Utah, that would not be a legitimate basis for discriminating against the malpractice claims of minors. And even if we were to assume that increased minors' malpractice claims increased malpractice insurance premiums and costs of health care to some extent that would not justify

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38. NAIC, Malpractice Claims: Final Compilation, Medical Malpractice Closed Claims, 1975-1978 (1981) and U.S. Department of HEW, Pub. No. 73-88. Medical Malpractice: Report of the Secretary's Commission on Medical Malpractice 254 (1973).

39. *See also Kenyon v. Hammer*, 688 P.2d 961, 978 (Ariz. 1984) (citing the same reports and finding that there was no basis for concluding rising healthcare costs had any causal connection to an increase in medical malpractice premiums.) 97% of all medical malpractice claims were reported within four years of injury. The court found no long-tail claims problem mandating the need for shorter periods of limitation. *Id.*

> shifting the costs of malpractice injuries from health-care providers to injured children and their caretakers.

Id. at 587.

The New Hampshire court in *Carson*, also held that the special statutes of limitation enacted for medical malpractice cases could not abrogate the protection afforded to minors under a saving statute tolling claims until age of majority:

> The legislature may not, consistent with equal protection principles, deny only this class of medical malpractice plaintiffs the protection afforded all other persons by the saving statute. In doing so [the statute at issue] does not substantially further the legislative object of containing the costs of the medical injury reparations system because the number of malpractice claims brought by or on behalf of minors or mental incompetents is comparatively small. At the same time, the statute operates to extinguish a cause of action which the plaintiff, due to his disability, may not have learned until after the limitations period has expired. . . .

424 A.2d at 834 (Internal citations omitted).

In *Schwan v. Riverside Methodist Hosp.*, 452 N.E.2d 1337 (Ohio 1983), the court held that a similar statute triggered at age ten violated equal protection:

> We recognize that the General Assembly often must draw lines in legislation. Yet, it is the age of majority which establishes the only rational distinction... Therefore, in light of our conclusion that [the statute] creates an irrational classification which does not rationally further the purpose of [the legislation], we hold that [it] is unconstitutional on its face with respect to medical malpractice litigants who are minors.

Id. at 1339.

In *Mominee v. Scherbarth*, 503 N.E.2d 717 (Ohio 1986), the court then held that the statute addressed in *Schwan* also violated due process:

> [T]he sum and substance [of the statute] is that a minor shall have no standing to sue before attaining the age of majority, and no right to bring suit thereafter. Such, in our view, is totally unreasonable and patently

> arbitrary. The practical effect of our holding will restore the 'disabilities' tolling statute . . . for minors with malpractice claims.

A concurring justice noted in *Mominee* that

> [r]esearch has revealed no authorities which contend that due to the high cost of malpractice insurance, it is no longer profitable to be a healthcare provider. . . . Nor is there any evidence that the medical profession has at any time been in danger of extinction. Thus, I find no rational connection between [the statute] and the purposes for which it was enacted. Therefore [the statute] 'fails to pass constitutional muster as it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.'

Id. at 727. The Court cited *Shessel* in support for its position invalidating the Ohio statute. *Id.* at 728.

In *Sax v. Votteler*, 648 S.W.2d 661, 666-67 (Tex. 1983), the court described the heart of the problem with such statutes:

> A child has no right to bring a cause of action on his own unless disability has been removed. If a minor does bring a cause of action in his own behalf, the action is subject to being abated upon a timely plea of the defendant. If the parents, guardians, or next friends of the child negligently fail to take action in the child's behalf within the time provided by [the malpractice statute], the child is precluded from asserting his cause of action under that statute. (Citations omitted).

The Texas statute, the court wrote, "effectively abolishes a minor's right to bring a well-established common law cause of action without providing a reasonable alternative. . . ." *Id.* at 667.

The court in *Sax* noted that inherent deficiencies of the statute could not be cured by the fact that parents, guardians, or next friends could assert the rights of the child:

> If the parents, guardians, or next friends of the child negligently fail to take action in the child's behalf within the time provided . . . , the child is precluded from asserting his cause of action under that statute. . . . The child, therefore, is effectively barred from any

> remedy if his parents fail to timely file suit. Respondents argue that parents will adequately protect the rights of their children. This Court, however, cannot assume that parents will act in such a manner. It is neither reasonable nor realistic to rely upon parents, who may themselves be minors, or who may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit within the time provided. . . .

648 S.W.2d at 666-67 (citations omitted). The statutes challenged here have the same inherent constitutional defects.

CONCLUSION

Starting a statutory clock running on patients and children who lack the competence or the training to discover most medical errors and who do not know of a resultant injury cannot comport with equal protection or due process. A state legislature cannot rationally decide that minors are incompetent and incapable of protecting their rights before age of majority – and indeed precluded from doing so – and then later decide that they nevertheless must do so in medical malpractice cases. The challenged statutes trump other Georgia laws protecting the rights of minors until age of majority. They co-exist with a statutory discovery rule which obtains only in cases of foreign objects left in surgical patients, found to be unconstitutional in other states such as New Hampshire.

The Fourteenth Amendment cannot abide conceptually indistinguishable laws from one state to the next, which in the one satisfy the Constitution and in the next do not. Nor do statutes which deprive patients or children (or both) of rights and remedies available to others conform to due process or equal protection of the law. A child here spent sixteen years with undiagnosed HIV/AIDS and the next five learning that Georgia courts do not have to hear his whole case. The Supreme Court of the United States should grant the Writ of Certiorari.

Respectfully submitted,

J. ROBERT PERSONS
CARTER & ANSLEY LLP
Atlantic Center Plaza, Suite 2300
1180 West Peachtree Street
Atlanta, Georgia 30309
(404) 658-9220

Attorneys for Petitioners

APPENDIX

APPENDIX A – ORDER OF THE SUPREME COURT OF GEORGIA DATED FEBRUARY 27, 2006

SUPREME COURT OF GEORGIA

Atlanta February 27, 2006

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

S06A0943. CHARLES CANAS, et al. v. AYMAN AL-JABI, et al.

S06X0944. SHARON J. KAMINER v. CHARLES CANAS, et al.

S06X0945. AYMAN AL-JABI v. CHARLES CANAS, et al.

S06X0946. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA v. CHARLES CANAS, et al.

S06X0947. MCG HEALTH, INC. v. CHARLES CANAS, et al.

This appeal and cross-appeals arise out of a medical malpractice action brought on behalf of a minor. The trial court granted summary judgment to the defendants for all malpractice claims in which the alleged negligence occurred more than five years before suit was brought. The trial court held that OCGA §§ 9-3-71 and 9-3-73 do not violate the due process or equal protection clauses of the United States or Georgia constitutions, and it is the constitutional rulings that cause the appellants to invoke this Court's jurisdiction. However, this Court has previously upheld these statutes against the same challenges as they relate to minors. See *Crowe v. Humana Hospital*, 263 Ga. 833 (439 SE2d 654) (1994); *Smith v. Cobb County-Kennestone Hosp. Authority*, 262 Ga. 566 (423 SE2d 235) (1992). Accordingly, the constitutional rulings do not invoke this Court's jurisdiction, *Zepp v. Mayor*

Appendix A

and Council of the City of Athens, 255 Ga. 449 (339 SE2d 576) (1986). Accordingly, the appeal and cross-appeals are hereby transferred to the Court of Appeals.

s/ [illegible]
Chief Deputy Clerk

APPENDIX B – ORDER OF THE SUPREME COURT OF GEORGIA DENYING MOTION FOR RECONSIDERATION DATED APRIL 13, 2006

SUPREME COURT OF GEORGIA

Case No. 506X0947

Atlanta, April 13, 2006

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

MCG HEALTH, INC. v. CHARLES CANAS et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

APPENDIX C – ORDER OF THE SUPERIOR COURT OF GLYNN COUNTY, STATE OF GEORGIA DATED AND FILED SEPTEMBER 19, 2005

IN THE SUPERIOR COURT OF GLYNN COUNTY STATE OF GEORGIA

CIVIL ACTION

File No. 01-01831

CHARLES AND LESA CANAS, As Natural Guardians and Next Friends of Derek Callas, a Minor,

Plaintiffs,

vs.

AYMAN AL-JABI, M.D., SHARON J. KAMINER, M.D., BOARD OF REGENTS OF THE UNIVERSITY OF SYSTEM OF GEORGIA d/b/a MEDICAL COLLEGE OF GEORGIA HOSPITALS AND CLINICS, and MCG HEALTH, INC.

Defendants.

ORDER

This case comes before the court on Defendants' Motion for Summary Judgment and Motions to Disqualify Witnesses. For the reasons set forth below, this court grants partial summary judgment to the defendants and denies Defendants' Motions to Disqualify Witnesses.

Summary Judgment is granted to Defendants for all medical malpractice claims in which the negligence that is the basis of the claim occurred more than 5 years before suit was filed. (The 5 year date is December 28, 1996 for all

defendants except the Board of Regents; the 5 year date for the Board of Regents is February 7, 1998.) O.C.G.A. § 9-3-71 (b) is the Georgia statue of repose in medical malpractice actions; it states: "(b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred." O.C.G.A. § 9-3-71(b). It is also clear that Georgia courts interpret this statute strictly.

> "Whether by discovery, which delays the accrual of the action, or by infancy, incompetency, or fraud, which may toll the statute of limitation for up to five years . . . , nothing stops the abrogation of the action by the statute of repose; five years after the negligent or wrongful act or omission occurred, despite any non-discovery or any tolling, the medical malpractice action or potential action ceases to exist by abrogation of law under the statute of repose." *Simmons v. Sonyika et al*, 279 Ga. 378, 380 (2005).

While this statute and its interpretation may be unfair, or even absurd as it applies to cases such as this one, it is the law and we must apply it. Accordingly, Summary Judgment is granted to Defendants on all claims for medical malpractice where the alleged negligent or wrongful act or omission occurred more than 5 years before the date on which this action was brought.

Defendants' Motion for Summary Judgment is denied as to all claims for medical malpractice where the alleged negligent or wrongful act or omission occurred within 5 years of the date this action was brought. O.C.G.A. §§ 9-3-71(a),(b), and (c) make it clear that negligent or wrongful acts or omissions occurring within 5 years of the date an action is brought are actionable if the claims are

brought within two years of the occurrence of the injury they caused and, therefore, not barred by the statute of limitations.

> "(a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.
>
> (b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.
>
> (c) Subsection (a) of this Code section is intended to create a two-year statute of limitations. Subsection (b) of this Code section is intended to create a five-year statute of ultimate repose and abrogation. O.C.G.A. § 9-3-71 (2005).

Accordingly, Summary Judgment is Denied to Defendants on all medical malpractice claims where the injury occurred within 2 years of the date this action was filed and the negligent or wrongful act or omission that caused the injury occurred within 5 years of the date this action was filed.

Defendants' Motions to Disqualify John W. Sleasman, M.D., Janice E. Milligan, M.D., and Steven L. Shore, M.D. as expert witnesses is denied. Plaintiff's experts meet the requirements of O.C.G.A. § 24-9-67.1. Since defendants question whether they are qualified to testify in this area of medicine, the applicable portion of O.C.G.A. § 24-9-67.1 is § (c)(2)(a):

> "(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:
>
> > (a) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed *or* rendered negligently by the defendant whose conduct is at issue;"

Each of these experts is proposed to testify in the area of pediatrics. Each of them has been actively engaged in the practice of pediatrics for at least three of the last five years with sufficient frequency to establish an appropriate level of knowledge concerning the practice of pediatric medicine.[1]

Defendants read the statute to state that each expert mast practice in exactly the same specialty as the defendant. Defendants' reading of the statute is adverse to the plain reading of the statute. The statute states the expert must have "actual professional knowledge and experience in the area of practice or specialty in which the opinion is to he given" O.C.G.A. § 9-24-67.1(c)(2). The statute does not state

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1. Expert Sleasman practices in the fields of Pediatrics, Allergy and Immunology, and Diagnostic and Laboratory Immunology and has practiced in each of these areas for the last 5 years; Expert Shore practices Pediatrics specializes in pediatric infectious diseases and has practiced in these areas for the last 5 years; Expert Milligan practices Pediatrics and specializes in primary care and has practiced in these areas for the last 5 years.

that the expert must have actual professional knowledge and experience in the exact area of practice or specialty in which the defendant doctor specializes. It is apparent that the legislature realizes that doctors' areas of practice often overlap. This overlap is apparent from the practice of medicine as doctors from several different specialties often participate in the treatment of a patient, This Court's reading of the statute is also supported by other courts facing the same question. *See Murphy, et al. v. Anders, et al.*, Superior Court of Muscogee County, Civil Action Number SU01CV3120, Order dated August 5, 2005 (stating that a hematologist is qualified to testify concerning sickle cell anemia when the defendant doctor is an emergency room doctor); *Phillips v. Cotten*, State Court of Dougherty County, Civil Action Number 01-SCV815, Order dated June 10, 2005 (stating that a vascular surgeon is qualified to testify concerning vascular issues when the defendant doctor is a general orthopedic surgeon).

Considering the wording of the statute and the rulings of other similarly situated courts, this Court therefore rules that experts must only have actual professional knowledge and experience in the subject matter to which they are testifying, not that an expert's entire practice be in the same exact specialty as that of the defendant.

Accordingly, Defendants' Motions to disqualify witnesses Sleasman, Shore and Milligan is Denied.

Defendants' Motions to Disqualify Dr. Williams as an expert witness is denied. Although Dr. Williams meets the requirements of O.C.G.A. 24-9-67.1(c)(2)(a) as outlined above, this is not necessary as he is not testifying to allegations of medical malpractice. Defendants' argument that Dr. Williams' testimony does not meet *Daubert* standards as now codified in Georgia law is without merit. O.C.G.A. 24-9-97.1 (b) states:

Appendix C

"(b) If scientific, technical, or ether specialized knowledge will assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the cases"

Dr. Williams vast experience, knowledge, skill, training, and education qualify him to testify concerning medical records. *See* Exhibit 2 of Williams Deposition, C.V. of Dr. Roger A. Williams. Dr. Williams' testimony will be based on facts or data which will be admitted into evidence at trial. Dr. Williams testimony is the product of reliable principles and methods.[2] Dr. Williams has applied these principles and methods reliably to the facts of this case. *See* Affidavit of Roger A. Williams, M.D. Dr. Williams' principles and methods were applied in the late 1980s and early 1990s and were successful. In fact, the standard of care used by Dr. Williams has proven to be the best and most effective standard of care in dealing with patients who may have received AIDS through a blood transfusion. Had it been

2. Dr. Williams expresses that his actions were based on recommendations by the CDC and Public Health Service in 1987 and that they were reinforced by the "Report of the Presidential Commission on Human Immunodeficiency Virus Epidemic" published June 24, 1988. (Item number 10 in the affidavit of Dr. Williams)

applied in the case at bar, it is likely that no litigation would have occurred and Derek Canas' injuries would have been greatly lessened. Dr. Williams' principles and methods are clearly reliable and should be admitted.

In oral argument, defendants argued that since Dr. Williams proposed a high standard of care that few hospitals attained, his testimony was not acceptable. This Court disagrees with that proposition. When evaluating admissibility of evidence, courts must consistently apply the law in ail cases. If the court rules that a plaintiff's expert cannot testify because her standard of care or scientific reliability has proven to be too high because she was one of the few in the country using that standard or method, the court must also rule that defendant's expert in the same situation could not testify because his standard of care or method would he too high if he was one of the few in the country using that higher standard. This would create the awkward situation where a defendant could not present evidence from the leading practitioner in his field that had a very high standard of care or very advanced method for performing a procedure yet another expert could testify for the plaintiff to a lower standard of care or less advanced method of performing a procedure.[3] Judges are not called on to base decisions regarding admissibility on whether the plaintiff or defendant proposes the evidence. Instead, judges must determine whether testimony meets scientific

3. Effectively, defense counsel's argument would make it so that a world renowned surgeon who had perfected a technique that, for example, would effectively allow someone to recover from an ACL injury in two months could not testify that a surgeon followed his exact method for treating the injury but that a less advanced doctor who had no idea how to perform this advanced operation could testify against the surgeon using the advanced method because "most doctors did not use the advanced method so it is not in the mainstream of science." It is extremely doubtful that the legislature intended a result such as this that would discourage doctors from using advanced treatments and having a higher standard of care.

standards for reliability and is based upon application of those scientific standards to the facts of the case. Dr. Williams testimony clearly meets these standards. Therefore, Defendants' Motion to Disqualify Dr. Williams as an expert is Denied.

Accordingly, Defendants' Motions for Summary Judgment are Granted as to all claims of medical malpractice occurring more than 5 years before this suit was filed and Denied for all claims of medical malpractice occurring within 5 years of the day this suit was filed; Defendants' Motions to Disqualify Expert Witnesses Sleasman, Shore, Milligan, and Williams are Denied.

This 19 day of September 2005.

s/ Amanda F. Williams
AMANDA F. WILLIAMS
Judge, Superior Courts
Brunswick Judicial Circuit

APPENDIX D – ORDER OF THE SUPERIOR COURT OF GLYNN COUNTY, STATE OF GEORGIA DATED OCTOBER 14, 2005 AND FILED OCTOBER 17, 2005

IN THE SUPERIOR COURT OF GLYNN COUNTY STATE OF GEORGIA

CIVIL ACTION

FILE NO. 01-01831

CHARLES AND LESA, CANAS, as Natural Guardians and Next of Friends of DEREK CANAS, a minor,

Plaintiffs,

v.

AYMAN AL-JABI, M.D., SHARON J. KAMINER, M.D., BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA d/b/a MEDICAL COLLEGE OF GEORGIA HOSPITALS AND CLINICS, and MCG HEALTH, INC.

Defendants.

ORDER

This Court having entered an Order on September 19, 2005 diapositive of certain issues pertaining to summary judgment motions of the parties, and the Order by implication having affirmed the constitutionality of O.C.G.A. §§ 9-3-71 and 9-3-73, the Court hereby expressly finds that those two statutes do not violate the equal protection or due process clauses of the United States or Georgia Constitutions. See, *Smith v. Cobb County-Kennestone Hospital Authority*, 262 Ga. 566, 423 S.E.2d 235 (1992).

Appendix D

This issue has been raised by the plaintiffs in opposition to defense motions for summary judgment It is of critical importance to the disposition of the case that there be an immediate review of this Order and in the event that an appellate court determines that this Order or the prior Order of the Court of September 19, 2005 is not subject to direct appeal, the Court hereby ratifies a review of this Order for immediate review.

This 14 day of October, 2005.

s/ Amanda F. Williams
AMANDA F. WILLIAMS
Judge, Glynn County Superior Court
Brunswick Judicial Circuit

APPENDIX E – ORDER OF THE COURT OF APPEALS OF THE STATE OF GEORGIA DATED NOVEMBER 2, 2005

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA,

The Court of Appeals hereby passes the following order:

NOV 02 2005

A0610048. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA v. CHARLES CANAS ET AL.

A0610050. SHARON J. KAMINER, M.D., ET AL v. CHARLES CANAS ET AL.

A0610052. MCG HEALTH, INC. v. CHARLES CANAS ET AL.

A0610053. AYMAN AL-JABI, M.D. v. CHARLES CANAS ET AL.

On October 6 and 7, 2005, defendant applicants fled applications for interlocutory review of the order, entered September 19, 2005, which granted in part and denied in part their motions for summary judgment and denied their motion to disqualify witnesses. On October 17, 2005, the trial court entered an order in which it noted that its order of September 19, 2005 had implicitly affirmed the constitutionality of OCGA §§ 9-3-71 and 9-3-73, and expressly ruled that OCGA. § 9-3-71 and 9-3-73 did not violate the equal protection and due process clauses of either the Constitution of the United States or the Georgia Constitution of 1983.

On October 18, 2005, plaintiff respondents filed a timely notice of direct appeal of the orders entered September 19, 2005 and October 17, 2005. The notice of appeal contains a

jurisdictional statement asserting that exclusive jurisdiction of the direct appeal is vested in Supreme Court of Georgia. Subsequently, each of the defendant applicants filed timely notices of cross appeal. Accordingly, all matters raised in these applications can now be asserted in these cross appeals. OCGA § 5-4-34 (d).

Under *Saxton v. Coastal Dialysis &c.*, 267 Ga. 1278 (476 SE2d 587) (1996), the ultimate responsibility for determining appellate jurisdiction is vested in the Supreme Court of Georgia. It appears that the same constitutional issues as have arisen in the direct appeal world now be litigated if these applications are granted. Therefore, in the interest of judicial economy, these applications are TRANSFERRED to the Supreme Court of Georgia for appropriate appellate disposition when the direct appeal currently being processed in the Superior Court of Glynn County is forwarded to the Supreme Court for determination.

s/ [illegible]
Clerk

APPENDIX F – CONSTITUTIONAL AND ADDITIONAL STATUTORY PROVISIONS

Ga. Const. art. VI, § 6, ¶ II. Exclusive appellate jurisdiction of Supreme Court:

The Supreme Court shall be a court of review and shall exercise exclusive appellate jurisdiction in the following cases:

> (1) All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question.

O.C.G.A. § 1-2-8. Rights of minors:

> The law prescribes certain ages at which persons shall be considered of sufficient maturity to discharge certain civil functions, to make contracts, and to dispose of property. Prior to those ages they are minors and are, on account of that disability, unable to exercise these rights as citizens.

O.C.G.A. § 9-2-28. Effect of action by minor alone:

> An action commenced and prosecuted by an infant alone shall not be void. Although the action may be defective in wanting a guardian or next friend, the defect shall be amended before verdict and cured by verdict.

Appendix F

O.C.G.A. § 9-3-33. Injuries to the person:

Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year after the right of action accrues, and except for actions for injuries to the person involving loss of consortium, which shall be brought within four years after the right of action accrues.

O.C.G.A. § 9-3-71. General limitations*:

Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which the negligent or wrongful act or omission occurred.

O.C.G.A. § 9-3-71. General limitations:

(a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.

(b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.

---

* This former version of O.C.G.A.§ 9-3-71 was enacted in 1976, and was held unconstitutional in *Shessel v. Stroup,* 316 S.E.2d 155 (Ga. 1984) after being held unconstitutional in its application to a wrongful death case where the death occurred more than two years after the negligent act in *Clark v. Singer, 298* S.E.2d 484 (1983).

(c) Subsection (a) of this Code section is intended to create a two-year statute of limitations. Subsection (b) of this Code section is intended to create a five-year statute of ultimate repose and abrogation.

(d) Nothing contained in subsection (a) or (b) of this Code section shall be construed to repeal Code Section 9-3-73, which shall be deemed to apply either to the applicable statutes of limitation or repose.

O.C.G.A. § 9-3-72. Foreign objects left in body:

The limitations of Code Section 9-3-71 shall not apply where a foreign object has been left in a patient's body, but in such a case an action shall be brought within one year after the negligent or wrongful act of omission is discovered. For the purpose of this Code section, the term "foreign object" shall not include a chemical compound, fixation device, or prosthetic aid or device.

O.C.G.A. § 9-11-9.1. Affidavit of expert to be filed with complaint in action for damages alleging professional malpractice:

(a) In any action for damages alleging professional malpractice against a professional licensed by the State of *Georgia* and listed in subsection (d) of this Code section or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (d) of this Code section, the plaintiff shall be required to file with the

complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

(b) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that said affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9-11-15 within 30 days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing said amendment or response to the motion, or both, as it shall determine justice requires.

(c) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit within the time required by this Code section and the failure to file the affidavit was the result of a mistake.

(d) The professionals to which this Code section applies are:

(1) Architects;

(2) Audiologists;

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(3) Attorneys at law;

(4) Certified public accountants;

(5) Chiropractors;

(6) Clinical social workers;

(7) Dentists;

(8) Dietitians;

(9) Land surveyors;

(10) Medical doctors;

(11) Marriage and family therapists;

(12) Nurses;

(13) Occupational therapists;

(14) Optometrists;

(15) Osteopathic physicians;

(16) Pharmacists;

(17) Physical therapists;

(18) Physicians' assistants;

(19) Professional counselors;

(20) Professional engineers;

(21) Podiatrists;

(22) Psychologists;

(23) Radiological technicians;

(24) Respiratory therapists;

(25) Speech-language pathologists; or

(26) Veterinarians.

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O.C.G.A. § 9-11-17(c). Parties plaintiff and defendant; capacity:

> *Infants or incompetent persons.* Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may bring *or* defend an action on behalf of the infant or incompetent person. If an infant or incompetent person does not *have* a duly appointed representative, he may bring an action by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person. No next friend shall be permitted to receive the proceeds of any personal action, in the name and on behalf of an infant, or incompetent person, until such next friend shall have entered into a sufficient bond to the Governor, for the use of the infant and the infant's representatives, conditioned well and fully to account for and concerning such trust, which bond may be sued on by order of the court in the name of the Governor and for the use of the infant. Such bond shall be approved by the court in which the action is commenced and such approval shall be filed in such clerk's office.

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O.C.G.A. § 39-1-1. Age of majority; nonresident students:

(a) The age of legal majority in this state is 18 years; until that age all persons are minors.

(b) Nothing in this Code section shall be construed automatically to render an individual a resident of this state when that individual is in the state for the purpose of attending school. In the case of such individual, his residence will be considered to be the state in which his parents reside if under the laws of that state the individual would still be considered a minor and he is incapable of proving his emancipation.